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Federal Communications Commission
Office of Secretary

OUR FILE NUMBER
892,050-215

January 29, 2004

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Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: ***WC Docket No. 02-359***

Dear Ms. Dortch:

Enclosed for filing is the original and four copies of Verizon's Reply in Support of its Petition for Reconsideration and Clarification in the above referenced docket. In addition, we are enclosing eight copies for the arbitrator. Thank you.

Sincerely,

Kimberly A. Newman
of O'Melveny & Myers LLP

cc: Stephen T. Perkins
Martin W. Clift, Jr.
Richard U. Stubbs
Christopher Savage
Ms. Terri Natoli
Mr. Jeremy Miller
Mr. Brad Koerner
Mr. Marcus Maher
Mr. Richard Lerner
Mr. John Adams
Ms. Margaret Dailey
Ms. Deena Shetler

012

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of Cavalier Telephone, LLC	)	
Pursuant to Section 252(e)(5) of the	)	WC Docket No. 02-359
Communications Act for Preemption	)	
of the Jurisdiction of the Virginia State	)	
Corporation Commission Regarding	)	
Interconnection Disputes with Verizon	)	
Virginia, Inc and for Arbitration	)	

VERIZON VIRGINIA INC.'S REPLY IN SUPPORT OF ITS PETITION FOR RECONSIDERATION AND CLARIFICATION

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January 29, 2004

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I. INTRODUCTION

Pursuant to 47 C.F.R. Section 1.106, Verizon Virginia Inc. ("Verizon") respectfully submits this Reply in Support of its Petition for Reconsideration and Clarification.

II. THE BUREAU SHOULD RECONSIDER ITS DECISION TO MODIFY OR STRIKE LANGUAGE TO WHICH THE PARTIES AGREED DURING NEGOTIATIONS

Cavalier Telephone LLC's ("Cavalier's") arguments for setting aside language to which it agreed during negotiations are without merit. Section 252 requires that the Bureau decide open issues consistently with the requirements of section 251, but where the parties agree on terms, the Bureau cannot change them in a section 252 arbitration. The plain language of section 252 makes clear that such arbitrations are concerned only with "unresolved issues,"[1] and that terms agreed upon through voluntary negotiations are binding "without regard to the standards set forth in subsections (b) and (c) of section 251" – the provisions providing the standards for arbitration of unresolved issues.

Cavalier does not contest that it agreed to the contract language in question during negotiations. In fact, the record clearly shows that the parties agreed that the language in question was *not* in dispute.[2]

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[1] Section 252 (b)(2)(A) requires the parties in arbitration to state their "unresolved issues," and Section 252(b)(4)(A) limits the arbitration to those unresolved issues.

[2] *Compare* "*Parties Final Proposed Contract Language*," October 29, 2003 at 9, Column 1 ("11.2.12(A) Cavalier shall place orders for xDSL Compatible Loops and Digital Designed Loops by delivering to Verizon a valid electronic transmittal service order or other mutually agreed upon type of service order. Such service order shall be provided in accordance with industry format and specifications or such format and specifications as may be agreed to by the Parties.") to 10, Column 2 ("11.2.12.2(A) Cavalier shall place orders for xDSL Compatible Loops and Digital Designed Loops by delivering to Verizon a valid electronic transmittal service order or other mutually agreed upon type of service order. Such service order shall be provided in accordance with industry format and specifications or such format and specifications as may be agreed to by the Parties."), *See Verizon October 29 Proposed Pricing Attachment* at 8 ("Standard Digital Loops, Recurring Charge, $.40/ Mechanized Loop Qualification per Loop Provisioned"), *Cavalier October 29 Proposed Pricing Attachment* at 4 ('Standard Digital Loops, Recurring Charge, $.40/ Mechanized Loop Qualification per Loop Provisioned"), *See* August 1 Draft Agreement § 11.2.15.1 (§ 11.2.15.1 was not in dispute *at all* when the parties filed their best and final offers on October 29).

Staff also made it abundantly clear at the hearing that it would not consider contract language that the parties did not include in their final offers. *See, e.g., Hearing Tr.* at 653 (Lerner), 654 (Natoli). Despite Cavalier's contrary assertion that the arbitration was not intended to address "open or unresolved contract language,"[3] the sole purpose of the Joint Decision Point List ("JDPL") was to identify for Staff the actual contract language to be decided.

> Mr. Lerner. And then once the final JDPL is submitted, that will become part of the record.
>
> Ms. Natoli. Yeah, then that's what we will put – you know, we'll base our decisions on the language that that reflects.
>
> Mr. Lerner. And if it's not in there, it won't be decided.

Hearing Tr. at 661. In light of these statements by Staff, Cavalier's assertion that the arbitration was meant to address issues, and not contract language, is incorrect. In fact, Staff has repeatedly made clear that contract language is a central focus of this proceeding.[4]

Even if this arbitration were solely about open issues, Cavalier's argument still fails. For instance, Cavalier sought in Issue C9 "to adopt pricing for loop conditioning and loops used by Cavalier to provide xDSL services." *See Cavalier Petition*, Exhibit A at 2. But Cavalier only objected to Verizon's *non-recurring* rates for manual loop qualification and line station transfer, claiming that these rates should be set at the "lowest Verizon rate approved by a public service commission within Cavalier's footprint." *See Cavalier October 29 Proposed Pricing Attachment* at 4. Cavalier never raised the *issue* of whether Verizon's *recurring* charge for mechanized loop qualification was too high, indeed, Cavalier expressly agreed that it was not. *See id.*

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[3] *Reply to Verizon's Petition for Reconsideration*, January 22, 2004 ("*Cavalier Opposition*") at 1 (emphasis deleted).

[4] *See generally*, 1) "*Procedures Established for Arbitration of an Interconnection Agreement Between Verizon and Cavalier*," DA 03-2733, August 25, 2003, 2) September 12, 2003 letter from Jeremy Miller, "Re *Arbitration of Interconnection Agreement Between Cavalier and Verizon*, 3) in a joint teleconference with Staff on October 22, 2003, and 4) October 24, 2003 letter from Richard Lerner, "Re *Arbitration of Interconnection Agreement Between Cavalier and Verizon*, WCB Docket No. 02-359, Final Proposed Contract Language and *Ex Parte* Communications." "memorializing the procedures regarding submission of final proposed contract language for the Arbitrator's consideration in reaching a decision on the unresolved issues in this proceeding."

Cavalier's argument that some of the language that the Bureau set aside is "now-outmoded" in light of certain Commission findings in the *Triennial Review Order* is particularly disingenuous *Cavalier Opposition* at 2. The *Triennial Review Order* was released on August 21, 2003, and Cavalier had ample opportunity to dispute the "offending" language in the numerous JDPL and Final Offer filings after that.[5] Instead, Cavalier voluntarily agreed to include the sentence, "Verizon shall not be required to perform splicing to provide fiber continuity between two locations." *See Joint Decision Point List*, filed September 16, 2003, at 23 When the parties filed their respective Final Offers on October 24, 2003 (nearly two months *after* the release of the *Triennial Review Order*), neither of the parties indicated that *any* of the language in section 11.2.15 1 was in dispute Therefore, the Bureau should reconsider its decision to set aside language on which the parties agreed

III. VERIZON'S TRANSIT TRAFFIC PROPOSAL IS CONSISTENT WITH THE BUREAU'S ORDER AND IS NOT AN ATTEMPT TO RETURN TO THE STATUS QUO (ISSUE C3)

On reconsideration, Verizon asked for contract language making it clear that Verizon meets its obligation to Cavalier when Verizon passes to Cavalier the billing information that Verizon receives from the originating carrier *Verizon PFR* at 3 This request is completely consistent with the *Order's* unequivocal holding that:

> Verizon must pass to Cavalier information necessary to identify the originating carrier or calling party in order to render accurate bills, *to the extent Verizon has that information in some ascertainable form*. . We agree that Verizon is unable to pass to Cavalier information that Verizon does not receive and *we do not expect Verizon to attempt to obtain information that it does not have*.

Order ¶ 40 (emphasis added). Unfortunately, the *Order's* Section 5 6.6 2 does not reflect this holding and might be misconstrued to penalize Verizon if it fails to pass "sufficient information"

---

[5] *Id*

that Verizon does not have

Cavalier claims that Verizon's request "would simply revert the parties back to the *status quo* prior to the arbitration,"[6] but this is not so. Verizon is not questioning the requirements of the *Order*, including the requirement that Verizon must pass billing information in its possession, even if that information is "not embedded in industry standard billing data." *Cavalier Opposition* at 4 (emphasis deleted) Rather, Verizon seeks clarification in the situation where Cavalier requests billing information that Verizon does not have *at all* "in some ascertainable form." *Order* ¶ 40 Even Cavalier acknowledges that the *Order* does not require Verizon to pass information that it does not have.[7] Verizon's proposal on reconsideration merely seeks to clarify the contract language to reflect the *Order's* holding, and Cavalier's argument that Verizon is seeking more than this is wrong

IV. THE ORDER SHOULD NOT HAVE DELETED ALL LOOP QUALIFICATION LANGUAGE (ISSUE C9)

Cavalier offers no persuasive reason why all of Verizon's proposed loop qualification language in section 11.2.12.2 should be stricken. For example, Cavalier does not even contest Verizon's showing that section 11 2 12 2 conforms to both the *Virginia Arbitration Order* and the *Virginia Cost Issues Arbitration Order*

Cavalier's only substantive argument is that Verizon's proposed language does not specifically mention LFACS. But, as Verizon pointed out in its Petition for Reconsideration, this relatively minor criticism does not justify striking *all* of Verizon's loop qualification language. The *Order* could easily have written an additional provision to address access to LFACS As Cavalier notes, the "Bureau is plainly authorized to take this step" as an alternative to adopting

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[6] *Cavalier Opposition* at 5

[7] *See Cavalier's Opposition* at 3-4, *citing Order* ¶ 42 ("Verizon must send to Cavalier '*whatever information it has* about the originating carrier or calling party number where such information is not readily apparent on the billing tapes sent to Cavalier and Cavalier requests such information '" (emphasis added))

either party's language in its entirety *Cavalier Opposition* at 5, *citing* 47 C F.R § 51.807(f)(3)

Verizon's *Petition for Reconsideration* explained that the loop qualification processes reflected in Verizon's proposed section 11.2.12.2 are consistent with the Bureau's Orders in the *Virginia Arbitration* and were approved by the Commission itself in Verizon's Virginia section 271 proceeding The Bureau should thus reconsider its decision to delete *all* of Verizon's proposed section 11 2 12 2 Cavalier has offered no reason for the Bureau to decline to do so, and the Bureau could have written an additional provision to address LFACS to satisfy the only specific concern Cavalier raised in its *Opposition*.

V. THE BUREAU SHOULD NOT HAVE EXCLUDED SECTION 18.2 FROM THE AGREEMENT'S LIMITATION OF LIABILITY PROVISIONS (ISSUE C25)

Cavalier asserts that Verizon did not provide the Bureau any reason to reconsider its decision to exempt violations of section 18 2, the customer contact guidelines, from the agreement's limitation of liability provisions. This is not accurate. As Verizon previously explained, the exclusion of section 18 2 from the limitation of liability provisions was apparently based on the misunderstanding that, without such an exclusion, Cavalier would be "unable to seek redress" for violations of section 18 2 *Order* ¶ 183 Verizon pointed out that the exception created in the *Order* is not necessary for Cavalier to be able to seek redress for claimed violations of section 18.2. Verizon identified the testimony of its witness who stated that, with respect to breaches other than service failures, Section 25 3 only limits a breaching party's liability for indirect and consequential damages. *Hearing Tr* at 576-577 (Romano). It does not restrict a party from pursuing claims for violations of section 18.2, nor does it limit a party's liability for direct damages for breaches of that section.[8] Verizon further explained that since

[8] *See, e g , Hearing Tr* at 217 5-6 (Romano) ("Cavalier can obviously bring a complaint, they can bring suit against Verizon for that problem ")

there is nothing in the record indicating otherwise and since the Bureau offers no policy reason for its decision, there is no support for the *Order's* exclusion of section 18 2 from the limitation of liability provision. *See Verizon's PFR* at 6-7.

Cavalier's only other argument – that the Bureau should not reconsider its decision to exclude violations of section 18.2 from the limitation of liability language because "it can be very difficult to prove direct damages for this kind of misconduct" – makes no sense *See Cavalier Opposition* at 6 The fact that it may be difficult to prove direct damages is an argument in support of liquidated – not consequential – damages Indeed, Cavalier made this same argument in support of its request for liquidated damages that the *Order* expressly rejected. *Order* ¶ 157 Cavalier's position is illogical because the burden of proof for indirect and consequential damages is *higher* than it is for direct damages. *See e.g Hadley v Baxendale*, 9 Ex 341 (1854). Therefore, if Cavalier is unable to prove any direct damages for a violation of section 18.2, it will not be able to prove indirect and consequential damages for the same violation Indeed, courts upholding the well-settled principle that telecommunications carriers may reasonably limit their liability to prevent the recovery of consequential damages[9] have not recognized an exception when direct damages were difficult to prove.

[9] *See, e g , In the Matter of AT&T*, 76 F C C 2d 195 at ¶ 9 (1980), *citing Western Union Telegraph Co v Priester*, 276 U S 252 (1928), *Western Union Telegraph Co v Esteve Bros & Co* , 256 U S. 566 (1921), *Holman v Southwestern Bell Telephone Co* , 358 F Supp 727 (D Kan 1973), *American Tel & Tel Co v Florida-Texas Freight Co* , 357 F Supp 977 (S D Fla), aff'd per curiam, 485 F 2d 1390 (5th Cir 1973), *Wheeler Stucky, Inc v Southwestern Bell Telephone Co* , 279 F Supp 712 (W D Okla 1967), *Waters v Pacific Telephone Co* , 12 Cal 3d 1, 114 Cal Rptr 753, 523 P 2d 1161 (1974), *Cole v Pacific Tel & Tel Co* , 112 Cal App 2d 416, 246 P 2d 686 (1952), *Southern Bell Tel & Tel Co v Invenchek, Inc* , 130 Ga App 798, 204 S E 2d 457 (1974), *Wilkinson v New England Tel & Tel Co* , 327 Mass 132, 97 N E 2d 413 (1951), *Weld v Postal Telegraph Cable Co* , 199 N Y 88, 92 N E 415 (1910)

VI. THERE IS NO SUPPORT FOR THE "WINBACK" CHARGE THE BUREAU AWARDED CAVALIER (ISSUE C27)

In its *Petition for Reconsideration*, Verizon explained that the Bureau lacked jurisdiction to impose a "winback" charge on Verizon. *Verizon PFR* at 9-10 Cavalier disagrees, arguing that the *Order* really did not "set" a winback charge "at least not in any ratemaking sense." *Cavalier Opposition* at 7. This argument is simply wrong. Before the *Order*, Cavalier had no authority to impose a winback charge The *Order* purports to give Cavalier the authority to impose such a charge and fixes the level of that charge. *Order* ¶ 208 This is ratemaking, and no amount of hand waving by Cavalier can change that fact.[10]

On the merits, Cavalier fails to justify the $13.49 winback rate that it proposes to charge Cavalier claims that the rate is justified because it is the same as Verizon's loop installation charge and that "most of the [winback] functions performed by Cavalier are in fact the same" as the functions performed by Verizon when it installs a loop for Cavalier. *Cavalier Opposition* at 7 This claim, however, is inconsistent with the record. Cavalier admitted that, in a winback situation, it does not perform the cross-connect that Verizon completes when Verizon installs a loop,[11] and Verizon also explained that its loop installation rate includes functions, such as rearranging facilities in the field, that Cavalier does not perform The record also makes clear that Cavalier's proposed *winback* charge deals only with nine administrative functions that Cavalier performs when a customer transfers from Cavalier to Verizon[12] – functions for which

[10] Cavalier also makes an "equitable" jurisdictional argument not contained in the *Order* Relying on *CoServ L L C v Southwestern Bell Telephone Company*, No 02-51065, filed Nov 21, 2003 (5th Cir), Cavalier argues that Verizon agreed to negotiate winback charges and that the Bureau therefore had authority to impose such a charge *Cavalier Opposition* at 7 n 6 The Bureau, however, has already rejected this argument. *Order* ¶ 189 n.611. Moreover, *CoServ* simply held that, in a section 252 arbitration, the Texas Public Utility Commission lacked jurisdiction to allow a CLEC to collect a charge for intrastate services provided to an ILEC *CoServ*, at 8-9 The language relied on by Cavalier is merely dictum

[11] *Ferris Direct* at 3, *Cavalier Brief* at 76

[12] *Ferris Direct* at 3 3 (listing functions that Cavalier performs in a winback scenario as "Initiate Service Order, Provide CRS upon request, Service Order Confirmation, Delete Switch Translations, Install intercept as applicable, Update SOA, Coordinate LNP, Test/Trouble Shoot, Expedite")

Verizon does not charge Cavalier

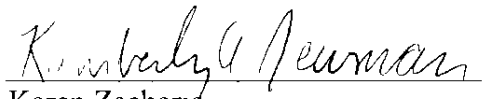
Cavalier also claims that the $13 49 rate is justified because of Verizon's supposed admission that most of the functions performed by Cavalier in a winback situation are the same as those performed by Verizon in a loop installation. *Cavalier Opposition* at 8 The record, however, contains no such admission Instead, Verizon's witness testified only that Verizon recovers its costs for *performing a cross connect* through its Service Order Connect charge[13] – an activity that Cavalier does not perform for Verizon in connection with a winback [14]

In short, Cavalier provided no record basis for its proposed $13 49 Cavalier nevertheless argues that it was not required to provide any such basis because it "did not propose any new rates of its own " *Cavalier Opposition* at 8 Cavalier cannot have it both ways. If it did not propose a rate in this arbitration, it is not entitled to collect one. If it did propose a rate, it was obligated to justify the level of that rate, which Cavalier did not do. For these reasons, the Bureau should reconsider decision to impose a $13 49 winback rate on Verizon.

[13] *Hearing Tr* at 594 (Clayton)
[14] *Ferrio Direct* at 2 21 3 4, *Cavalier Brief* at 76

DATED January 29, 2004.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on the 29th day of January, 2004, the Reply of Verizon Virginia Inc in the above-captioned proceeding was served on the following parties:

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